

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: NATIONAL COLLEGIATE) Docket No. 13 C 9116
ATHLETIC ASSOCIATION STUDENT-) April 17, 2015
ATHLETE CONCUSSION INJURY) Chicago, Illinois
LITIGATION,)
) 10:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS - STATUS, MOTION
BEFORE THE HONORABLE JOHN Z. LEE

APPEARANCES:

ALSO PRESENT: HONORABLE GERALDINE SOAT BROWN

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1 (Proceedings had in open court:)

2 THE CLERK: 13 C 9116, NCAA Student Athlete Concussion
3 Injury Litigation, for status and motion hearing.

4 MR. BERMAN: Good morning, your Honor. Steve Berman,
5 Beth Fegan and Thomas Ahlering on behalf of the class.

6 MR. MESTER: Good morning, your Honor. Mark Mester
7 and Johanna Spellman for the NCAA.

8 MR. SILVERMAN: Good morning, your Honor. Michael
9 Silverman with my colleague Rich Miller on behalf of Siprut PC
10 and the settlement class.

11 MR. JEFFERSON: Judge, Dwight Jefferson on behalf of
12 plaintiff.

13 MR. EDELSON: Good morning, your Honor. Jay Edelson,
14 proposed lead for the personal injury class.

15 THE COURT: Good morning, everyone.

16 We are here for a status. There are a number of
17 motions that were filed and noticed for today for presentation.
18 Let's deal with a couple of them first off before we proceed to
19 the motion for preliminary approval of the revised settlement.

20 So first of all, the plaintiffs have filed a motion
21 for leave to file plaintiffs' fourth amended complaint to add
22 additional class representatives. Is that correct, Mr. Berman?

23 MR. BERMAN: That's correct, your Honor. Six
24 representatives.

25 THE COURT: Is there any objection to the motion?

1 MR. MESTER: No objection, your Honor.

2 THE COURT: Very well. So the plaintiffs' motion for
3 leave to file fourth amended complaint is granted.

4 The other motion to address before we proceed is
5 plaintiffs' motion for leave to file documents under seal.
6 That is, motion for leave to file certain documents that were
7 attached to Mr. Berman's affidavit, as well as leave to redact
8 certain portions of the memorandum in support of the settlement
9 agreement.

10 Is there an objection to that motion?

11 MR. MESTER: No objection, your Honor.

12 THE COURT: All right. Very well. So plaintiffs'
13 motion for leave to file documents under seal is also granted.

14 MR. JEFFERSON: Yes, can I ask this question on that?
15 Being under seal, will we have an opportunity at any point to
16 be able to review those documents?

17 THE COURT: You may.

18 All right. Let's then turn to plaintiffs' motion in
19 support or for preliminary approval of class settlement and
20 certification of settlement class. I will note that there has
21 been a lot of materials that have been submitted to the Court
22 over the course of the last couple of days. And I have
23 reviewed the memorandum in support as well as the settlement
24 agreement. I am still going through the supporting
25 declarations, including the declarations of Mr. Deal, as well

1 as Mr. Mishkin.

2 MR. MESTER: Yes, your Honor.

3 THE COURT: Mr. Mishkin, who has been offered in
4 support of the financial adequacy of the \$70 million for the
5 proposed medical monitoring class. I thought I would -- since
6 it's noticed for presentation today, Mr. Berman, I thought I'd
7 give you an opportunity to go ahead and highlight some of the
8 revisions that were made to the agreement and provide any other
9 arguments that you would like today. Also hear from the NCAA.

10 And, Mr. Edelson, to the extent that you have any
11 comments, I know that your prior comments are probably equally
12 applicable to the settlement that's revised because the release
13 claims haven't changed. But I will give you an opportunity to
14 be heard today as well.

15 Mr. Berman?

16 MR. BERMAN: Yes. First of all, your Honor, I
17 appreciate that we gave you this material. I apologize that it
18 came so close to the 17th. We tried to get it to you much
19 earlier. But with the schedules of the four doctors and
20 special master, it was difficult to get everyone together in
21 the same room. So I apologize for that. And I expect that you
22 may have further questions of us down the road. But let me
23 highlight what we did do.

24 As you can see from the volume, and volume of course
25 doesn't speak to quality, we put a lot of work into this. And

1 we went back, and we looked at your December 18 order and your
2 comments. And we tried to address with a yes every single
3 comment and request that you made. I think we did. So I'll
4 just walk through them.

5 Your first concern -- and I'm not sure these are in
6 order of your concerns, but this is the order which I will
7 address them in.

8 One of your concerns was that we didn't have enough
9 representation across the class members. And so we have -- now
10 have eight current class members, 17 former class members. We
11 have 11 non-contact class members, and we have 14 contact class
12 members. And so we didn't get every single sport covered, but
13 we did I think get enough sports to have typicality.

14 And these class representatives did more than most.
15 They had an extensive telephone interview with Judge Andersen.
16 Judge Andersen talked to them, the risk and benefits of the
17 settlement. And each one has individually commented why they
18 think the settlement is in the best interest of the class based
19 on their experience as an NCAA athlete. And I think if you get
20 a chance to read those, you will find them to be important.

21 The second thing we did was, we updated the Deal
22 report to deal with what is the effect of the participation
23 rate if you add non-contact sports. And he's dealt with that.
24 And the key note there is the finding that he made based on his
25 review of the medical literature in consultation with Dr. Cantu

1 that there is not a significant increase in CTE in non-contact
2 sports. So we don't expect increased cost in that regard.

3 I also --

4 THE COURT: Mr. Deal, he also took into consideration
5 the questionnaire and scoring parameters that were proposed by
6 the medical or the proposed medical committee, is that correct?

7 MR. BERMAN: He did. But I -- I regretfully say, I
8 found this morning in my final, final preparation, he made an
9 error. And we will try to get a revised report. He did not
10 take into account the notice cost. It somehow dropped out of
11 the draft. I apologize. We will get that to you. So maybe
12 you hold off reading that until we get that hopefully Monday.

13 You commented about the notice plan. We have been
14 working with the NCAA. We believe we're going to be able to
15 obtain within six months 2.9 million addresses of the
16 4.4 million potential class members. That's a fairly high
17 number for a direct mail campaign.

18 Now, of course, we recognize that there is going to be
19 some bad addresses. And Mr. Vasquez has given you some
20 information about the percentages of bad addresses that we see.
21 So we think that we're going to be able to mail to at least
22 half the class. And we're going to wait for a period to see
23 what the returns are on the addresses. And then we'll ramp our
24 publication, internet and media notice up higher if we have a
25 lower return, until we -- until we reach the frequency and

1 reach the -- what we think is required by the case law.

2 The next point was, you addressed the concerns what
3 happens if one of these schools doesn't participate in the
4 concussion management protocols. Now every school must certify
5 in writing within six months that they will do so. And if they
6 don't do so, they will not be released.

7 We've also added a little twist to that that we
8 thought about. And that is, if a class member is an athlete at
9 one of the schools that decides not to participate and is not
10 released, that class member now can opt out again. They can
11 get back on the website at the appropriate time, see that the
12 school did not participate, and they will be allowed to opt
13 out. So we think that's a good benefit to the class.

14 The medical science committee report. We met with
15 Judge Andersen. We've had numerous phone calls. There was a
16 vigorous exchange of scientific information. In fact, I was
17 commenting to Mr. Mester this morning that it was amazing how,
18 much like lawyers they can be in a room not getting along.

19 But they eventually reached a consensus. And I think
20 one interesting point that you might want to look at when you
21 are reading the materials is what I call the look-back
22 provision. So they've established cut scores based on general
23 information that's out in the public. And we're going to
24 recommend those cut scores be used for the first year.

25 Then after the first year is done, they're going to

1 take a look at actual data that we're getting from the student
2 athletes, and they are going to redo the cut scores. And they
3 are going to keep doing that. And then they're going to go
4 back. And anyone who is disqualified in the first year, we're
5 going to rerun to see if they qualify under the new cut scores
6 and let them know that they now qualify.

7 THE COURT: So that would be if, for example, for
8 whatever reason the original evaluation thresholds were too
9 stringent based upon the statistical analysis, you can look at
10 that and say, well, perhaps we're not catching everyone that we
11 need to catch. So we're going to try to broaden the criteria a
12 little bit.

13 MR. BERMAN: Exactly, exactly.

14 You also directed us to deal with what happens if a
15 settlement class member requests more than two medical
16 evaluations. That will now -- that request will be bumped up
17 to the special master. Special master will contact the class
18 member and will then contacted the medical science committee to
19 see what needs to be done. So it will be done on an
20 individual-by-individual basis.

21 You asked that we address program location. And so we
22 are now establishing or recommending to the Court 33 program
23 locations. And the way we came up with the 33 is that -- that
24 means that 50 percent of the population would live within 50
25 miles of a treatment center, and 70 percent would live within a

1 hundred miles. And after that, the Garretson did some economic
2 analysis and said, it's a law of diminishing returns to spend
3 money to -- to get more centers.

4 The \$7 million he directed -- well, you told us that
5 you would not approve the settlement if the money reverted back
6 to the NCAA. The settlement provides that it will either be
7 used to extend the program, or it will be donated to an
8 institution selected by the medical science committee. So the
9 money will not revert back.

10 You expressed concern about the motion that if there
11 was not enough money, that the original settlement provided
12 that you could not bring a class action. Now you can bring a
13 class action. And I think to me, my colleagues may disagree,
14 but that's probably the most -- one of the most important
15 changes because it means that if the settlement is inadequate,
16 we can start over again.

17 And it's something that I want and could not get,
18 because I had a case like this. It was involving Louisiana
19 Pacific Siding. Thousands of homeowners' siding fails. The
20 defendant wanted the same provision, and I wanted to be able to
21 start over if the money ran out. The judge struck it, just
22 like you did and the money ran out, and we got a lot more
23 money.

24 So I think this is a very important change, and it
25 reduces the pressure on Mr. Deal's analysis.

1 THE COURT: It provides a safety valve, right?

2 MR. BERMAN: It's a safety valve.

3 THE COURT: I recognize that Mr. Deal and Mr. Mishkin
4 are very qualified in looking at damages and damages forecasts.
5 But 50 years is a long time. And to the extent that there are
6 contingencies that none of us can anticipate, that in the event
7 that the funds that are allocated for the medical monitoring
8 run out for whatever reason, then at least at a minimum, the
9 class can then restart the lawsuit to try to obtain relief.

10 MR. BERMAN: Yes. And I think it's even -- if I just
11 add one little tag line on that. It's even more important
12 because as -- as vigorous as the medical science committee has
13 been, and as vigorous as Mr. Deal has been, the area of CTE is
14 still an unknown area in which science is evolving. And this
15 way if things are much worse than anyone anticipated, we can
16 start over again.

17 THE COURT: All right. I also hope that that
18 provision provides some additional incentive for the parties,
19 in the event the funds do run out, to get back together and
20 decide whether or not additional funds should be invested in
21 the program to keep it going for the 50-year period.

22 MR. BERMAN: Exactly. I mean, we'll have the benefit
23 of everything we've learned both from our statistics, our
24 analysis. And -- and I think the parties will be well educated
25 to do something that provides the right remedy in the future.

1 The last two points, you wanted the settlement to make
2 sure that you had discretion to award attorneys' fees to any
3 attorney. It now provides for that. And you wanted the option
4 for the Court to appoint a special master. And we are
5 suggesting that Judge Andersen be the special master, and he is
6 willing to serve in that capacity. And he has been working
7 diligently with us throughout this process.

8 And so when I sum up the settlement, your Honor, you
9 have now 25 class members that are vigorously in support of the
10 settlement and have taken the time to work with Judge Andersen.
11 You have two federal Judges who have served as settlement
12 participants or mediators. They support the settlement. I'm
13 not suggesting that, you know, your judgment is not the
14 ultimate judgment.

15 You have four distinguished medical doctors. These
16 are the best in the field. They are the premier people who
17 have been analyzing these issues, all of whom support the
18 medical science protocol and the importance of doing this.

19 And facing us is one class member, who's atypical.
20 He's not been injured by a concussion. He has been offered
21 five or six months of time to present an expert that says
22 settlement is not good and fair. He hasn't done so.

23 So we think at this stage, we're at the preliminary
24 approval stage, that we've done everything that could and
25 should be done to have the settlement receive preliminary

1 approval.

2 THE COURT: Mr. Berman, let me ask you a little bit
3 about the examination location centers.

4 MR. BERMAN: Yes.

5 THE COURT: As I said, I am still in the process of
6 diving into all of the supporting documents. But with regard
7 to the Garretson declaration as to the location of these
8 centers, I understand that if a proposed class member lives
9 outside the hundred-mile radius of a center, that he can seek
10 reimbursement. I also noted, based upon the medical committee
11 declaration, that they anticipate that a typical evaluation
12 will take about five to eight hours, right?

13 And so I think in the Garretson declaration there was
14 some mention of the fact that in addition perhaps to the
15 mileage reimbursement, there might be also a reimbursement for
16 a reasonable overnight stay for the particular class member and
17 an additional person. I didn't see that particularly in the
18 settlement agreement, but I'm assuming that that would be part
19 of the reimbursement. So it would be allowable, is that
20 correct?

21 MR. BERMAN: Absolutely. It's at paragraph 33 of the
22 Garretson report. He details the amount that you would be able
23 to get for an overnight stay. It's at the IRS rate plus meals
24 and lodging.

25 THE COURT: Right. And I just note that because in

1 the settlement agreement it just says miles.

2 MR. BERMAN: Okay.

3 THE COURT: But I think we all are on the same page as
4 to what will be reimbursable or not.

5 Let me hear from the NCAA to the extent that you want
6 to say anything.

7 MR. MESTER: Thank you, your Honor.

8 I don't have a lot to add. Mr. Berman was very
9 thorough. As he says, though, our focus was to try to address
10 each of the issues you raised in your December 17 memorandum
11 opinion order. And we worked very hard at that. Believe me,
12 we did. His list was, I believe, comprehensive and accurate.

13 So I don't have anything to add other than answer any
14 questions you may have.

15 THE COURT: Very well. Is there anyone else that
16 wishes to speak at this point in time? Mr. Edelson?

17 MR. EDELSON: Thank you, your Honor.

18 Like you we only got the -- the voluminous documents
19 couple days ago. So we have not fully reviewed everything.
20 I've got some initial thoughts. But we would request the
21 ability to file a brief so that we can be both precise and have
22 it for the record and for your Honor.

23 Couple things I'd like to mention. First and the most
24 looming issue is the conflicts issue. We filed a motion
25 explaining that. At this point they can't even pretend that

1 they are representing the plaintiffs' personal injury class.
2 Mr. Berman was very candid, both in discussions with me and in
3 -- in his brief, where he said that he made a conscious
4 decision to trade the class claims in order to get the medical
5 monitoring deal through.

6 The class claims for personal injury, those class
7 members get no benefit from the medical monitoring claims.
8 They get no benefit from the injunctive relief. So he's taking
9 people that shouldn't be part of his class, and he's saying,
10 because I don't believe in your claims -- although even that he
11 slipped back. Before it was, there is no way. You can't ever
12 certify these. Now he's saying, it's hard to certify, which we
13 agree with. It's hard but it's not impossible.

14 And he's saying, those people, they are going to lose
15 rights because I care more about my people.

16 THE COURT: And, Mr. Edelson, with regard to
17 certification, you mean, certification under 23(b)(3)?

18 MR. EDELSON: It wouldn't matter what it's under. If
19 there is (b)(3) release, correct. He seems to be suggesting
20 that he can do a (b)(2) certification with the (b)(3) release,
21 which I -- I'm not smart enough to understand that.

22 THE COURT: But, I mean, I just want to understand
23 your position. Your position is that the personal injury
24 claims can be certified under 23(b)(3).

25 MR. EDELSON: Oh, I'm sorry. Yes, they can, which is

1 what -- and they tried -- tried a version of that initially
2 when they tried to get a core -- core issues class, which was
3 along those same lines.

4 THE COURT: I'm not sure whether that's exactly along
5 the same lines. But I understand your gist.

6 MR. EDELSON: Okay. The second thing is, the Pella
7 the recent Seventh Circuit decision which talks about what
8 happens when -- when a good-faith objector has raised issues of
9 conflicts. In that case, the District Court disagreed and
10 said, I don't see conflicts there.

11 The Seventh Circuit said, there are two problems.
12 One, there were conflicts. And it ended up ending with the
13 removal of class counsel. But the Seventh Circuit said
14 something else, which was, you've got to put in the notice that
15 there is this conflict.

16 They don't do that. They don't say, there is an
17 objector who has an argument that might be relevant to you.
18 They don't even in their notice say, you're going to be
19 releasing class claims. It's incredible. So someone who's
20 actually evaluating the notice will have no idea about all this
21 fight going on and what they're giving up. That's another big
22 issue.

23 Another issue is -- and I only make a few of these.
24 I'm not going to keep you here very long.

25 Another issue is, they still don't get it right when

1 it comes to tolling the personal injury claims. This is maybe
2 the fourth iteration. First it was through the filing of
3 preliminary approval. Then it was at preliminary approval.
4 Now it's at final approval.

5 The tolling for personal injury claims has to be the
6 effective date. If it is the date of final approval, that does
7 nothing for the class because after this -- if the Court does
8 accept this settlement, there will be an appeal. Two years
9 later there will be a decision. During those two years
10 everybody's personal injury claims will be extinguished, which
11 means the class will have to make a distinction: Do we hold
12 out that there may be a much better avenue through a class
13 action? Or do we bring our individual personal injuries right
14 now? It's untenable, which is why nobody does it like this.

15 The -- we also -- we also take issue with -- with
16 something which I have to give them the most credit for. And
17 it's unfortunate they did it wrong, which was they took your
18 Honor's idea and they said, let's make this a non-reversionary
19 fund. And that -- that is the game-changer here. That changes
20 from a settlement where only a few million dollars is going to
21 be paid out to 70 million.

22 The problem is that they did it wrong. What the
23 Seventh Circuit has said is, you got to look at who's getting
24 the money. And the class ought to be getting the money.

25 The way they do it, at the end of 70 years, you've got

1 these -- these -- it won't be these doctors anymore. It will
2 be some other doctors who will get in the room and decide, does
3 it go to continuing on the program, or does it go to research
4 or to academic institutions, which I'm sure of they'll all be
5 affiliated with.

6 It's hard to imagine they're not going to end up
7 giving it to research for concussions. If they did, of course,
8 that offers no benefit at all to the -- to the class, even to
9 their class. Their class members don't need to have 70
10 million -- \$40 million going to research concussions in 50
11 years. And it doesn't help them. There'll be a lot of
12 research done before that. And in 50 years the game's really
13 changed a lot.

14 There are ways that you can take the \$70 million and
15 make sure that -- that even for their medical monitoring part,
16 where the people are actually getting more benefits through
17 medical monitoring.

18 The last thing that I'll say is -- is, they claim
19 that -- they said this from the beginning, and -- and it's
20 almost getting tiring correcting them. But they keep
21 pretending that this is -- this is me, this is just me making
22 this objection. There is just one person. It's not true. We
23 have hundreds of -- of clients to stand behind us.

24 And the National College Players Association with
25 17,000 members came out publicly in support of our position.

1 So the idea that -- that their crew represents some objective
2 criteria just isn't true. Everybody in their crew is getting
3 paid, everybody, all the doctors, the special master. And
4 Judge Andersen is my favorite guy in the world. So I am -- in
5 no sense am I claiming that he is in a conflict at all.

6 All of those guys were supporting the first version of
7 the settlement, which was held not to be adequate. So this
8 idea that they got some ground-swell support I think is just
9 backwards.

10 Last thing I'll say, they -- they didn't mention this
11 to the Court, but they do something unusual in the settlement.
12 We weren't able to find any -- anyone actually daring to do
13 this.

14 In their quest to try to make sure that nobody can
15 file an objection, they excluded two class members from -- from
16 their class: My client and his client. And the only goal
17 there is similar when they -- when they -- when they said that
18 objectors shouldn't get paid, which they later claim was a
19 mistake.

20 Their only goal is to -- is to hope that -- that the
21 Court doesn't get full information, and that good-faith
22 objections don't get hurt. And the Seventh Circuit has made it
23 clear that that is incredibly improper.

24 THE COURT: All right. Thank you, Mr. Edelson. How
25 much time do you need to file? I will give you an opportunity

1 to put your objections in writing. How much time do you need
2 to file that?

3 MR. EDELSON: Twenty-one days, your Honor?

4 THE COURT: That will be fine. That's May 8.

5 Mr. Berman, I will give you an opportunity to respond
6 today to the extent you want to. Or I will give you an
7 opportunity to file a response as well.

8 MR. EDELSON: Thank you, your Honor.

9 THE COURT: Thank you, Mr. Edelson.

10 MR. BERMAN: Since it's an either or, I will file a
11 responsive a brief.

12 THE COURT: It is an either or. How much time do you
13 need to do that?

14 MR. BERMAN: Fourteen days please, your Honor.

15 THE COURT: So Mr. Edelson, on behalf of the Nichols
16 and his clients, can file an objection to the proposed class
17 settlement as revised by May 8. Plaintiffs and/or the NCAA can
18 file any response by May 22.

19 So at this point in time, as I said, I am still
20 getting through these materials. And I do appreciate the
21 amount of work that the parties have done to try to address the
22 concerns that I raised in my prior memorandum and order.

23 What I'd like to do at this point is, I am going to
24 continue my review of the materials. I am going to review the
25 briefs that are submitted by Mr. Edelson as well as Mr. Berman

1 and NCAA. And then more than likely after the briefs come in
2 on May 22, I will set another hearing date where I can discuss
3 with the parties particular questions that I may have with
4 regard to the settlement.

5 I can tell you right now that I know that among those
6 topics will be some additional questions with regard to Mr.
7 Deal's declaration as well as the declaration provided by the
8 Claro Group, Mr. Mishkin, as well as additional questions with
9 regard to the medical committee's declaration. I am just
10 trying to understand what exactly it is they are trying to do.
11 And that's really going to be in the next couple days here my
12 focus in reviewing these materials.

13 So that we have a date in our calendar, it is my
14 practice to customarily set a status date. So let's set a
15 status date in this case. Let's go about 60 days out. And so
16 let's look at, Carmen, June 26 at 10:00 a.m.?

17 MR. BERMAN: I hate to raise my schedule is an issue.
18 My wife has a 50th birthday. I am taking her on a surprise
19 trip on the 19th through the 29th of June.

20 HONORABLE JUDGE BROWN: It won't be a surprise if she
21 reads this.

22 MR. BERMAN: She does not read transcripts, I will
23 tell you that.

24 THE COURT: How about June 11? Does that work?

25 MR. MESTER: That's fine, your Honor.

1 MR. BERMAN: That is fine, your Honor.

2 THE COURT: So let's set it for June 11. And we will
3 set it for 2:00 p.m. Again, based upon the briefs, I might ask
4 the parties to come in sooner than that so that you can address
5 the questions that I have. But at this point at least we have
6 a set out there.

7 MR. BERMAN: And if you would like Mr. Deal or any of
8 the medical science people to be present, just let us know.

9 THE COURT: I will. Don't worry. I won't be shy.
10 Anything else that we need to address today?

11 MR. MESTER: No, your Honor.

12 MR. BERMAN: Nothing, your Honor.

13 THE COURT: All right. Very well. We are adjourned.
14 Thank you.

15 (Which were all the proceedings had at the hearing of the
16 within cause on the day and date hereof.)

17 CERTIFICATE

18 I HEREBY CERTIFY that the foregoing is a true, correct
19 and complete transcript of the proceedings had at the hearing
20 of the aforementioned cause on the day and date hereof.

21

22 /s/Alexandra Roth

4/22/2015

23 Official Court Reporter
24 U.S. District Court
25 Northern District of Illinois
Eastern Division

Date